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CITATION

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78739—38

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

DONALD H. OWENS AND MARION HAVILAND OWENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on March 14, 1938.

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 15–20) is unreported. The opinion of the Circuit Court of Appeals (R. 36–37) is reported in 95 F. (2d) 318.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1938 (R. 37–38). On mo-

tion of the petitioner, this Court entered an order on June 2, 1938, extending the time for filing a petition for writ of certiorari for 60 days from June 7, 1938 (R. 38). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the basis for determining the amount of a loss "sustained during the taxable year," through an accident to property which is not used in a trade or business and is not subject to an annual depreciation allowance, should be the original cost or the value immediately before the accident.

STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * * *

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. * * *

* * * * * *

(h) *Basis for determining loss.*—The basis for determining the amount of deduction for

losses sustained, to be allowed under subsection (e) or (f), shall be the adjusted basis provided in section 113 (b) for determining the loss from the sale or other disposition of property.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (unadjusted) of property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(b) *Adjusted basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

* * * * *

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws. * * *

STATEMENT

The Board, in adopting the stipulated facts, made substantially the following findings (R. 15–16):

The respondents are husband and wife. Prior to January 1, 1934, but after March 1, 1913, the

respondent Donald H. Owens purchased a Nash touring automobile at a cost to him of $1,825. The automobile at all times since has been, and was until June, 1934, used by him for his personal use only, and not in connection with any trade or business carried on by him. In June, 1934, by reason of an accidental collision with another automobile, the automobile was wrecked and partly demolished. It thereafter had a fair market value of $190. Immediately prior to such collision, the automobile had a fair market value of $225. He carried no insurance on the automobile and has not received any compensation through insurance or otherwise for any part of the loss sustained by reason of the accident. (R. 15–16.)

The respondent and his wife filed a joint income tax return for the calendar year 1934. No deduction on account of depreciation of the automobile was claimed or allowed during any taxable year. In the return for 1934 filed by the respondents, a loss deduction was claimed in the amount of $1,635, being the difference between the cost and the salvage value of the automobile immediately after the accident. The Commissioner allowed a deduction in the amount of $35, representing the difference between the fair market value of the automobile immediately prior to the accident and its salvage value immediately after the accident. (R. 16.)

The Board held that the deduction as claimed by the respondents should be allowed and determined

that there was no deficiency in tax for the year 1934 (R. 20-21).

The Circuit Court of Appeals affirmed the Board's decision (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in failing to hold that the amount of the deduction allowable to the respondents for the loss on their automobile which was used for personal purposes is the difference between the fair market value of the automobile immediately before the accident and its value thereafter, and in holding that the basis for determining the amount of the loss is the original cost.

2. The Circuit Court of Appeals erred in affirming the decision of the Board.

REASONS FOR GRANTING THE WRIT

The agreed value of the automobile immediately before the collision was $225 and, immediately afterwards, was $190. Thus the actual loss due to the collision was only $35. But the court below has approved a deduction of $1,635, the difference between the cost of the automobile and its value after the accident.

1. This decision seems contrary to well-established principles of tax law. The Revenue Acts have always restricted deductions for losses to those which were sustained during the taxable year, and Section 23 (e) (3), *supra*, itself permits de-

duction only for losses "sustained during the taxable year." It is plain that the loss which may be deducted under the decision of the court below was not sustained during the taxable year.

Moreover, under the stipulated facts the deduction of $1,635 represents a loss of only $35 due to the collision plus a further deduction of $1,600 due to accumulated depreciation and obsolescence. Section 23 (e) (3) permits deduction, as a loss arising from a casualty, of the former item, but there is no provision in the Revenue Act of 1934 permitting deduction for depreciation and obsolescence of property not used in a trade or business; much less is there a provision for deducting the accumulated depreciation or obsolescence of several preceding years.

In making a mechanical application of Section 23 (h), referring to Section 113, *supra*, the court below has lost sight of the basic structure of the Act. As this Court in *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 126, has said that, "the true meaning of a single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained if it be considered apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part."

2. The decision of the court below is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Helvering* v.

Obici, decided June 6, 1938, not yet reported but found in 1938 Prentice-Hall, Federal Tax Service, Vol. 1, par. 5.479. In that case the respondents in 1925 acquired a boat, boathouse, and pier at a cost of $5,325. The property was not used in a trade or business, and was totally destroyed by storm in 1933. The actual value of the property immediately prior to its destruction was $3,905. The Commissioner allowed the latter amount as a deduction. The Board of Tax Appeals ruled that the entire $5,325 must be allowed. The Circuit Court of Appeals reversed the Board. Speaking of the present decision of the court below, it said that "With due respect to the decision of the Second Circuit, we do not feel able to follow it." The Circuit Court of Appeals for the Fourth Circuit held that only the actual loss from the storm could be deducted because "The federal revenue laws have been consistent in allowing the deduction of only actual losses" and "only in the year sustained". It accordingly concluded that "it is hardly reasonable to suppose that Congress intended to allow a deduction as loss for the full cost of non-business property destroyed, notwithstanding such property had been depreciated through use."

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

JULY 1938.

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